STATE OF MICHIGAN

COURT OF APPEALS

DYNA GRIND SERVICES, LLC, and MARCO FUSCO,

Plaintiffs/Counter-Defendants-Appellees,

v

CITY OF RIVERVIEW,

Defendant/Counter-Plaintiff/Third-Party Plaintiff-Appellant,

and

TIM DURAND, RANDY ALTIMUS, ROBERT BOBECK, DAVID SUPUTA, and JOHN MENNA,

Defendants/Counter-Plaintiffs,

v

RLI INSURANCE COMPANY,

Third-Party Defendant/Third-Party Plaintiff,

v

MV CONSTRUCTION, INC., and CANS UNLIMITED, LLC,

Third-Party Defendant.

UNPUBLISHED
May 4, 2006

No. 255825
Wayne Circuit Court
LC No. 01-135578-CK

Before: Cooper, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant City of Riverview,[1] appeals as of right from the trial court's order entered on a jury verdict in favor of plaintiffs Dyna Grind Services, LLC, and Marco Fusco.[2] The jury found that defendant had breached its contract with plaintiff, and awarded plaintiffs $1,350,000. The trial court denied defendant's requests for a directed verdict, judgment notwithstanding the verdict (JNOV), new trial, and remittitur. We affirm.

I. Basic Facts

Fusco owned Cans Unlimited, LLC, MV Construction, Inc., and Dyna Grind Services, LLC. A portion of plaintiffs' business involved reducing trash volume by grinding garbage. Defendant had limited space available in its landfill. Thus, Fusco or one of his employees approached defendant with a proposal to grind defendant's trash. Plaintiffs represented that the waste-grinding operation would achieve significant reductions in the volume of trash deposited in defendant's landfill. After negotiations, plaintiff and defendant entered into a trash-grinding contract, to commence in July 2000 and end in July 2005. The contract provided that defendant would pay plaintiffs based on the actual tonnage of waste ground in any given month.

Plaintiff began grinding defendant's garbage under the terms of the contract in October 2000. Fusco testified that he had made substantial investments in plant and equipment before beginning operations. Plaintiff billed defendant for 2,054 tons of waste in October 2000, 3,155 tons in November 2000, 8,154 tons in December 2000, and 1,021 tons in January 2001. By February 2001, plaintiffs asserted that they had begun to lose money. Plaintiffs met with defendant in an effort to obtain assurances of more grindable waste or to receive more money per ton. Plaintiffs estimated that they needed 250 tons of grindable waste per day just to break even.[3] Defendant refused to pay more money per ton, and apparently indicated that it could not send plaintiff any additional grindable trash. Plaintiffs stopped operating in May 2001, attributing the shutdown to the loss of money.

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[1] Throughout this opinion use the of the singular term "defendant" will refer to the City of Riverview only. The remaining defendants are not involved in this appeal. We note that David Suputa's real name is David Sabuda; however, for purposes of this opinion, we will refer to him as Suputa, which is how he is listed on this Court's docket sheet.

[2] Throughout this opinion use of the term "plaintiffs" will refer to Dyna Grind Services, LLC, and Marco Fusco. The singular term "plaintiff" will refer to Dyna Grind Services, LLC, only. Fusco was the sole owner and member of Dyna Grind Services, LLC.

[3] Defendant disputes this figure, contending that plaintiff would not have been able to keep up with two 250 tons of trash per day. One of defendant's employees testified that he had observed problems with plaintiff's ability to keep up, stating that plaintiff's operation had been shut down for a period and that waste had not been ground during that time. He also testified that plaintiff had occasionally refused to accept grindable garbage from defendant. However, Fusco testified that defendant was always able to keep up with grinding. Moreover, Fusco testified that he had knowledge that defendant had not been sending plaintiff all of its acceptable, grindable waste.

Plaintiffs filed a complaint against defendants in which they alleged, *inter alia*, (1) breach of contract, (2) fraudulent misrepresentation with respect to the actual amounts of material to be ground by plaintiff, (3) tortious interference with contractual relations by directing grindable material directly to the landfill, (4) bad faith in dealing, and (5) civil conspiracy.[4] Defendants filed a counter-complaint, alleging breach of contract for failure to perform waste-grinding services as provided in the agreement, and negligent failure to adequately fund and maintain the grinding operation. Defendants subsequently sued plaintiff's bonding company, RLI Insurance, as well.[5]

Defendants moved for summary disposition, arguing that the breach of contract claim should be dismissed because the contract did not guarantee that defendant would deliver any specific minimum amount of grindable waste to plaintiff. Plaintiffs responded that the agreement clearly contemplated a guaranteed minimum monthly amount of grindable waste. Alternatively, plaintiffs argued that if the contract was ambiguous, a jury should decide whether it guaranteed a minimum amount of grindable waste. Defendants responded that the language granting "exclusive rights" did not obligate it to send all grindable waste to plaintiff. Defendant maintained that there was no required minimum amount contemplated by the contract.

Defendants filed a motion in limine to exclude evidence regarding their construction of additional landfill space. Defendants contended that it was irrelevant that the landfill had been expanded. Defendants also argued that any evidence of landfill expansion would confuse the jury. Plaintiffs responded that evidence of the landfill expansion was relevant and admissible to prove defendants' willful breach because the expansion negated the need for plaintiffs' trash-grinding services. The trial court denied the motion in limine, finding that the jury would understand the evidence of landfill expansion.

In September 2003, the trial court denied defendants' motion for summary disposition. The court found that the contract's language was ambiguous and that a question of fact existed as to whether the agreement required defendants to deliver a minimum monthly amount of grindable waste to plaintiff. In December 2003, defendants again moved for summary disposition. In February 2004, the trial court dismissed the claims against defendants Bobeck, Menna, and Suputa, but denied the remainder of defendants' motion for summary disposition.

At trial, defendant argued that a letter it had written to RLI was not admissible. The letter had suggested that the contract anticipated a minimum of 5,500 tons of grindable waste per month. Plaintiffs argued that the letter was integral to a proper understanding of the contract because it showed that defendant understood the contract to contain a monthly minimum. Defendant responded that the 5,500-ton amount mentioned in the letter and the contract was

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[4] In December 2002, an order was entered dismissing the claims against Durand and Altimus.

[5] Defendant filed a third-party complaint against RLI, contending that plaintiffs had failed to perform under the contract. RLI then filed a third-party complaint against MV Construction, Inc., and Cans Unlimited, LLC. In December 2003, a stipulated order was entered dismissing all claims against RLI. RLI, MV Construction, and Cans Unlimited are not parties to this appeal.

merely a projected amount, and was not a guaranteed minimum. Defendant also argued that the letter was not admissible under MRE 408 because it was compiled for use in settlement negotiations. The trial court ruled that the letter was admissible. Defendant also disputed the admissibility of another letter, containing projected amounts of grindable waste, which was written by its finance director at the direction of defense counsel. Defendant contended that the letter and attached numerical figures were protected by the attorney-client privilege. Plaintiffs argued that the documents should be admitted for purposes of interpreting the contract, and that the attorney-client privilege had been waived. The trial court ruled that the letter and attached figures were admissible.

On the third day of trial, defendant moved for a directed verdict. The trial court indicated that it had already dismissed all claims except the breach of contract claim.[6] However, the court denied the motion for directed verdict with respect to the breach of contract claim. The trial court indicated that it would let the jury decide the issue of contract interpretation, noting that there were remaining questions of fact with respect to the contract's meaning.

At the close of trial, the court instructed the jury. Among other things, the court instructed the jury that if it determined that the contract was ambiguous, the "ambiguity must be construed against the drafting party, that is [defendant]." The jury determined that defendant had breached the contract, and that plaintiff had sustained economic damages in the amount of $1,350,000. The trial court entered an order on the jury verdict awarding plaintiff a total judgment of $1,579,454.45, including interest, costs, and attorney fees. Defendant then moved for JNOV, or alternatively a new trial. Defendant also sought remittitur. The court denied defendant's motions for JNOV, new trial, and remittitur.

II. Summary Disposition, Directed Verdict, JNOV, and New Trial

Defendant first argues that the trial court erred in denying its motions for summary disposition, directed verdict, JNOV, and new trial. We disagree.

A. Standard of Review

We review a trial court's decision on a summary disposition motion de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). If a contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties, and summary disposition of the contract claim is inappropriate. *Meagher v Wayne State University*, 222 Mich App 700, 722; 565 NW2d 401 (1997). We also review a trial court's decision to grant or deny a directed verdict de novo. *Id*. at 708. "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Id*. A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469

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[6] We note that no orders are contained in the record to this effect. However, defendant had earlier requested dismissal of these claims in a motion for summary disposition. Regardless of whether these other claims were properly dismissed below, defendant raises only the breach of contract claim on appeal.

Mich 124, 131; 666 NW2d 186 (2003). We view the evidence and all legitimate inferences in the light most favorable to the nonmoving party. *Id.* If reasonable jurors could have honestly reached different conclusions, the jury verdict must stand. *Zantel Marketing Agency v Whitesell Corp*, 265 Mich App 559, 568; 696 NW2d 735 (2005). Finally, we review a trial court's decision to grant or deny a new trial for an abuse of discretion. *Kelly v Builders Square, Inc*, 465 Mich 29, 34; 632 NW2d 912 (2001). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 761-762; 685 NW2d 391 (2004), or the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias, *Bean v Directions Unlimited, Inc*, 462 Mich 24, 34-35; 609 NW2d 567 (2000).

Questions of contract interpretation, including the determination of whether contract language is ambiguous, are reviewed de novo on appeal. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47, 159; 664 NW2d 776 (2003). Where the terms of a contract are unambiguous, they are construed as a matter of law; but where the meaning is unclear or reasonably susceptible to more than one meaning, interpretation becomes a question of fact, and extrinsic evidence can be used to determine the parties' intent. *UAW-GM Human Resource Center v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998).

B. Contract Interpretation

Defendant contends that the contract was unambiguous, and did not require defendant to deliver any minimum amount of grindable waste to plaintiff. The contract language at issue provided in relevant part:

> 1. Exclusive Rights: City grants to Dyna-Grind *exclusive rights to grind acceptable waste* at the Land Preserve during the term of the Agreement, excluding clean wood received by the Land Preserve from its own agreement and prepaid contracts. Dyna-Grind grants to City exclusive rights to grinding operations of acceptable waste at solid waste facilities licensed by the State of Michigan and located within the County of Wayne, Michigan. Dyna-Grind, nor any related entity, will not grind waste at another solid waste management facility during the term of this Agreement. In addition to other considerations referenced in this Agreement, Dyna-Grind shall pay City an annual license fee of Five Hundred Dollars ($500).
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> * * *
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> 8. Dyna-Grind's Equipment and Operation: *All waste material deliveries shall be processed in accordance with normal Land Preserve policy, then transported to Dyna-Grind's designated grinding area.* Dyna-Grind shall provide all necessary equipment and personnel to grind waste, maintain the designated site and compliance with City's requirements. The grinder . . . *must be capable of grinding over Five Thousand (5,000) tons of acceptable waste per work week.* Dyna-Grind shall make available to City a minimum of Seventy Percent (70%) of the grinder's actual throughput for City's grindable waste streams.

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18. Other Operational Covenants:

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> *Acceptable grindable waste materials shall be limited to* construction and demolition debris, nonfriable asbestos type roofing, uncontaminated pallets, tree wood and brush, and other scrap wood. Specifically excluded are waste materials unacceptable for disposal under federal, state or local regulation as well as organic or industrial waste, stone, asphalt, brick, concrete and concrete block, and industrial waste. Tires without rims may be deemed acceptable grindable waste upon approval of the Riverview City Council.
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> *Acceptable grindable materials includes* both materials delivered by Cans Unlimited, a waste transportation company associated with Dyna-Grind Services, and other wastes delivered by such other of City's customers as City directs to the grinding area that meets the criteria set above. [Emphasis added.]

Further, the contract provided that plaintiff would be paid monthly on the basis of trash weight. Each month, plaintiff was to receive $9 per ton for the first 5,500 tons of trash, $7 per ton for any trash in excess of 5,500 tons but less than 8,500 tons, and $6 per ton for any trash in excess of 8,500 tons.

The threshold question in this case is whether the terms of the contract were ambiguous with regard to the quantity of grindable waste that defendant was to provide plaintiff. "A contract is ambiguous if its provisions may reasonably be understood in different ways." *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496; 628 NW2d 491 (2001). We find that the "Exclusive Rights" clause and the phrase "[t]he grinder . . . must be capable of grinding over Five Thousand (5,000) tons of acceptable waste per work week," when read in conjunction with the provision setting payment at $9 per ton for the "[f]irst 5,500 tons per month," render the contract susceptible to more than one reasonable interpretation. It is possible to interpret this language as envisioning no monthly minimum amount of grindable waste. However, it is equally possible to interpret this language as requiring defendant to deliver a minimum amount of grindable waste to plaintiff. Because the contract was ambiguous with respect to a minimum amount, interpretation was a question of fact. *UAW-GM Human Resource Center, supra* at 491. Thus, the trial court properly denied defendant's motion for summary disposition. *Meagher, supra* at 722. For the same reason, the trial court also properly denied defendant's motion for directed verdict. *Id.* at 708.

The relevant contract language could have been interpreted as (1) requiring no minimum amount of grindable waste, (2) requiring defendant to deliver at least 5,500 tons of grindable waste per month, or even (3) requiring defendant to deliver 5,000 tons of acceptable waste per week. "It is well settled that the meaning of an ambiguous contract is a question of fact that must be decided by the jury." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 469; 663 NW2d 447 (2003). Where a written contract is ambiguous, the jury must interpret the contract's terms "in light of the apparent purpose of the contract as a whole, the rules of contract construction, and extrinsic evidence of intent and meaning." *Id*., citing 11 Williston, Contracts (4th ed), §

30:7, pp 87-91. After considering the contract's ambiguous language and the evidence regarding the parties' intent, the jury concluded that the contract provisions at issue contemplated a minimum amount of grindable waste and that defendant had breached the contract by failing to deliver this minimum amount to plaintiff. Viewing all evidence in a light most favorable to plaintiffs, *Sniecinski*, *supra* at 131, we conclude that reasonable jurors could have honestly reached this conclusion, *Zantel Marketing Agency*, *supra* at 568. Defendant's motion for JNOV was properly denied. *Id*. In light of the jury's reasonable and supportable conclusion, the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Gilbert*, *supra* at 761-762.

III. Breach of Contract

Defendant next argues that the trial court should have concluded as a matter of law that it complied with the contract. For the reasons stated above, we disagree.

Defendant essentially argues that even if the contract was ambiguous, there was no breach because it supplied *some* acceptable waste to plaintiff. However, after finding that the contract's language was ambiguous, the jury concluded that the parties had intended a minimum amount of grindable trash. Despite the fact that defendant delivered *some* grindable waste to plaintiffs, the jury necessarily concluded that defendant had not delivered enough acceptable waste to satisfy the minimum amount intended by the parties. Because the minimum amount of waste contemplated by the parties was a question properly before the jury, and because the jury concluded that defendant had failed to deliver this minimum amount, defendant was not entitled to judgment on the breach of contract claim. We do not disturb the jury's determination that defendant breached the contract by failing to deliver the requisite minimum amount of grindable trash.

IV. Challenged Jury Instruction

Defendant next argues that the trial court erred by instructing the jury that the ambiguous contract language should be construed against defendant. We disagree.

A. Standard of Review

In general, claims of instructional error are reviewed de novo. *Cox v Flint Bd of Hospital Managers*, 467 Mich 1, 8; 651 NW2d 356 (2002). However, factual findings are reviewed for clear error, MCR 2.613(C), and a trial court's decision on whether a certain jury instruction is supported by the evidence and applicable to the case is reviewed for an abuse of discretion, *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 515; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998). "We review instructions in their entirety and do not extract them piecemeal." *Byrne v Schneider's Iron & Metal, Inc*, 190 Mich App 176, 182; 475 NW2d 854 (1991). Reversal is not required if the theories of the parties and the applicable law have been adequately and fairly presented to the jury. *Id*.; *Lewis v LeGrow*, 258 Mich App 175, 211; 670 NW2d 675 (2003).

B. The Contra Proferentem Instruction

The trial court gave the following instruction regarding interpretation of the ambiguous contract in this case:

> If you the jury decide that the contract is ambiguous, any ambiguity must be construed against the drafting party, that is the City of Riverview.

Our Supreme Court has provided that "[i]n interpreting a contract whose language is ambiguous, the jury should . . . consider that ambiguities are to be construed against the drafter of the contract. This is known as the rule of contra proferentem." *Klapp, supra* at 470-471 (citation omitted). As the *Klapp* Court recognized, the rule of contra proferentem

> is only to be applied if all conventional means of contract interpretation, including the consideration of relevant extrinsic evidence, have left the jury unable to determine what the parties intended their contract to mean. Accordingly, if the extrinsic evidence indicates that the parties intended their contract to have a particular meaning, this is the meaning that should be given to the contract, regardless of whether this meaning is in accord with the drafter's or the nondrafter's view of the contract. [*Id*. at 471 (footnote omitted).]

Because the parties engaged in negotiations prior to executing the contract, defendant asserts that it was not the drafter of the document for purposes of the contra proferentem instruction. Defendant cites *Third Horizon Group v Molitor & Molitor, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2001 (Docket No. 224058),[7] in support of its contention that a contra proferentem instruction was improper because both parties participated in negotiating the contract. The *Third Horizon Group* panel provided:

> [T]he trial court erred in construing the . . . provision against defendant on the basis that ambiguous contract language should be construed against the drafter. First, the trial court clearly erred in finding that defendant was the drafter of the addendum. The evidence showed that the final addendum, including the provision in question, although physically prepared by defendant, was the result of extensive negotiations between the parties and that both parties provided material terms. While evidence showed that defendant did provide the disputed language in the first sentence of the . . . provision, the principle that ambiguous contract language should be construed against its drafter should not have been applied here, when the addendum was the product of extensive negotiations between the parties, and the apparent contradiction in the . . . provision could be reconciled in light of the evident purpose and language of the provision as a whole. When considered in its entirety, the . . . provision is most reasonably construed as proposed by defendant; defendant's construction harmonizes the entire provision, while plaintiff's construction renders a portion of the provision surplusage.

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[7] Unpublished opinions are not precedentially binding under the rules of stare decisis. MCR 7.215(C)(1). However, they may be persuasive.

Thus, in *Third Horizon Group*, there was specific evidence that both parties had "provided material terms" to the contract through their initial negotiations. On the basis of this evidence, the *Third Horizon Group* panel concluded that the trial court had clearly erred in finding that the defendant was the drafter of the provision at issue.[8]

The present case is distinguishable from *Third Horizon Group*. Here the parties also engaged in ongoing negotiations prior to executing the contract. Additionally, defendant in the present case physically drafted the contract in the sense of putting the words on paper. However, in the case at bar there was no evidence that plaintiffs ever altered or challenged any of the contract terms initially included by defendant. Thus, unlike the facts of *Third Horizon Group*, there existed no specific evidence to indicate that both parties had supplied material terms. Citing the evidence that plaintiff merely accepted the contract as drafted by defendant, the trial court determined that defendant was the drafter of the document. The trial court did not clearly err in making this determination. MCR 2.613(C).

Having determined that defendant drafted the contract, the trial court properly gave the jury the disputed contra proferentem instruction. It is true that the rule of contra proferentem is to serve as a last resort, to be applied only after all other means of discerning the parties' intent have been exhausted. *Klapp, supra* at 471. However, the letters and other extrinsic evidence admitted in this case were largely unhelpful, merely reiterating the contract's actual language and providing no additional clues regarding the parties' likely intentions. Faced with the duty of determining the intent of the parties, but given little else on which to base its decision, the jury was properly instructed on the rule of contra proferentem. *Id*. The trial court did not abuse its discretion in determining that the contra proferentem instruction was applicable in this case. *Klinke, supra* at 515.

V. Admissibility of Evidence Concerning Landfill Expansion

Defendant next argues that the trial court erred in allowing plaintiffs to argue that the breach of contract was, at least in part, motivated by expansion of the landfill. Defendant asserts that this information was irrelevant, misleading, confusing, and unfairly prejudicial. We disagree.

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hospital*, 471 Mich 67, 76; 684 NW2d 296 (2004). An error in the admission

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[8] Further, as found by the *Third Horizon Group* panel, there were contextual clues concerning the parties' intent in that case. It was thus necessary for the factfinder to rely on these textual clues before resorting to the principle of contra proferentem, which is a rule of last resort. Specifically, the *Third Horizon Group* panel found that only one interpretation of the disputed language in that case would have fully effectuated the parties' intent without rendering any of the language surplusage. We note that because no such textually based evidence of intent was present in the instant case, the jury was properly permitted to employ the rule of contra proferentem.

or exclusion of evidence will not warrant reversal unless it appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Id*. Preliminary issues of law regarding admissibility, including the proper application of the rules of evidence, are reviewed de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

B. Evidence of Landfill Expansion

Generally, all relevant evidence is admissible. MRE 402; *Wayne Co v State Tax Comm*, 261 Mich App 174, 196; 682 NW2d 100 (2004). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Under this broad definition, evidence is admissible if explains an issue at trial. The trial court may exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." MRE 403. However, "[e]vidence is not inadmissible simply because it is prejudicial. Clearly, in every case, each party attempts to introduce evidence that causes prejudice to the other party." *Waknin, supra* at 334.

Defendant argues that evidence of the landfill expansion was irrelevant. However, plaintiffs presented evidence that the landfill expansion provided defendant more options with respect to trash disposal. Specifically, plaintiffs suggested that the expansion gave defendant the option of simply dumping more waste into its landfill instead of first grinding it to conserve space. Thus, evidence of landfill expansion was relevant to defendant's possible motivations for failing to send all of its grindable waste to plaintiff. In addition, defendant presented evidence that defendant was actively diverting some of its grindable waste from plaintiff. Thus, the evidence concerning landfill expansion was also relevant insofar as it tended to make plaintiffs' argument more probable. Contrary to defendant's position, the evidence concerning landfill expansion was relevant. MRE 401.

Defendant also asserts that the evidence of landfill expansion was misleading, confusing, and unfairly prejudicial. However, defendant provides no substantive argument with respect to these issues, and cites no legal authority in support of its position. An appellant may not merely announce its position and leave it to this Court to discover and rationalize the basis for its claims. *Ambs v Kalamazoo County Road Comm*, 255 Mich App 637, 650; 662 NW2d 424 (2003). Nor may he give issues cursory treatment with little or no citation of supporting authority. *Silver Creek Twp v Corso*, 246 Mich App 94, 99; 631 NW2d 346 (2001). Defendant's failure to properly address the merits of these additional arguments constitutes an abandonment of the issues on appeal. *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

VI. Admissibility of Documents

Defendant argues that certain documents, which were allegedly prepared in anticipation of litigation, were improperly admitted at trial. Specifically, defendant challenges the admission of a July 2001 letter written by its finance director, and a January 2002 letter written by its attorney. Again, we disagree with defendant's argument.

A. Standard of Review

As noted, a trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Craig, supra* at 76. An error in the admission or exclusion of evidence will not warrant reversal unless it appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Id*. Preliminary issues of law are also reviewed de novo. *Waknin, supra* at 332. Whether the attorney-client privilege applies to a communication is a question of law that we review de novo. *Leibel v General Motors Corp*, 250 Mich App 229, 236; 646 NW2d 179 (2002). The question of what constitutes a waiver of the attorney-client privilege is also a question of law that we review de novo. *Id*. at 240.

B. Evidence of the Parties' Intent

Defendant first suggests that the letters were improperly admitted for use in establishing the existence of an ambiguity in the contract. However, the letters were not admitted to prove the existence of an ambiguity. Rather, they were admitted to help ascertain the parties' intent in the event an ambiguity existed. When a contract is ambiguous, the parol evidence rule does not preclude use of parol or extrinsic evidence to aid in interpretation or construction of the written agreement. *Klapp, supra* at 470. "Such evidence is admitted not to add or detract from the writing, but merely to ascertain what the meaning of the parties is." *Id*. Having concluded that the contract was ambiguous, the jury properly considered the extrinsic evidence to determine the parties' intent. The court properly admitted the extrinsic evidence for the purpose of ascertaining the intent of the parties. *Id*.

C. Attorney-Client Privilege

Defendant next argues that the July 2001 letter, prepared in anticipation of upcoming litigation, was privileged. The attorney-client privilege attaches to direct communication between a client and his attorney as well as communications made through their respective agents. *Reed Dairy Farm v Consumers Powers Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998). The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his or her advisor that are made for the purpose of obtaining legal advice. *Id.* at 618-619. Confidential client communications, along with opinions, conclusions, and recommendations based on those communications, are protected by the attorney-client privilege because they are at the core of what is covered by the privilege. *McCartney v Attorney General*, 231 Mich App 722, 735; 587 NW2d 824 (1998).

The July 2001 letter and attachments were marked "privileged and confidential." The documents were prepared by defendant's financial director at the direction of defendant's attorney. Both individuals were clearly agents of defendant. Moreover, the information contained in the letter and attachments was generated for use in potential upcoming litigation against RLI. The documents were clearly the type to which the attorney-client privilege generally attaches.

However, plaintiffs argue that defendant waived the attorney-client privilege with respect to the July 2001 documents by voluntarily disclosing them to RLI. As noted, the question of what constitutes a waiver is a question of law. *Leibel, supra* at 240. There is no dispute that the challenged information was voluntarily given to RLI. "Once otherwise privileged information is disclosed to a third party by the person who holds the privilege, or if an otherwise confidential communication is necessarily intended to be disclosed to a third party, the privilege disappears."

Oakland Co Prosecutor v Dep't of Corrections, 222 Mich App 654, 658; 564 NW2d 922 (1997); see also *In re Ford Estate*, 206 Mich App 705, 708-709; 522 NW2d 729 (1994). The evidence showed that defendant voluntarily disclosed the essential contents of the July 2001 documents to either RLI or to plaintiffs' counsel during the course of certain depositions. Defendant waived the privilege when the information contained in the July 2001 documents was intentionally provided to a third party. The trial court properly concluded that defendant had voluntarily waived the attorney-client privilege with regard to this material.

D. MRE 408

Defendant argues that the January 2002 letter should have been protected by MRE 408 as part of an offer to compromise the third-party claim against RLI. MRE 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The January 2002 letter, which was written before the third-party suit against RLI was even filed, did not offer or promise to offer any valuable consideration in exchange for compromising any disputed claim. Nor did the letter accept or promise to accept valuable consideration in exchange for settling any claim. Indeed, there is no indication that the letter was written in an attempt to dispose of any claim whatsoever. Rather, the letter merely sought to explain to RLI the possible reasons for plaintiffs' alleged breach of the waste-grinding contract. It was not an offer to settle or compromise. The trial court did not abuse its discretion in declining to exclude the January 2002 material pursuant to MRE 408.

E. Relevance of the Documents

Defendant also argues that the July 2001 and January 2002 documents should not have been admitted because they contained mere projections, without factual support. Further, one of defendant's employees testified that the figures may not have been accurate, and all of the waste contemplated by the figures may not have been grindable. Thus, defendant contends that the contents of the documents were irrelevant to the instant lawsuit.

Notwithstanding defendant's assertions, the estimated figures contained in the documents were relevant to the instant litigation. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *VanElslander, supra* at 129. Plaintiffs argued in part that the contract required defendant to send *all* acceptable waste material, and the figures represented defendant's own estimates of the actual amount of available grindable waste.

Therefore, the figures contained in the documents were relevant to plaintiffs' argument that defendant was not sending all of its acceptable waste to be ground. Because the documents tended to make plaintiffs' arguments more probable than they would have been in the absence of the projected figures, the documents were relevant. MRE 401. We note that the trial court regulated the testimony with regard to the documents in order to limit any unfair prejudice that may have otherwise resulted. It therefore cannot be said that the documents' probative value was substantially outweighed by the potential for unfair prejudice. See MRE 403. The trial court did not abuse its discretion by admitting for limited purposes the projected evidence of grindable-waste amounts.

VII. Damages

Defendant argues that the trial court improperly denied its request to reduce the judgment to reflect plaintiffs' failure to mitigate damages. We disagree.

A. Standard of Review

We review a trial court's decision regarding remittitur for an abuse of discretion. *Grace v Grace*, 253 Mich App 357, 367; 655 NW2d 595 (2002); see also MCL 600.6098(4). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court made its decision, would conclude that there was no justification for the ruling made. *Diamond v Witherspoon*, 265 Mich App 673, 693; 696 NW2d 770 (2005). When reviewing a trial court's decision regarding remittitur, we view the evidence in the light most favorable to the nonmoving party. *Id.* The trial court is in the best position to evaluate the credibility of the witnesses and to make an informed decision regarding the correctness of the jury award; we therefore give deference to the trial court's ruling. *Phillips v Deihm*, 213 Mich App 389, 404; 541 NW2d 566 (1995).

B. Mitigation

Defendant challenges the amount of the jury award by contending that plaintiffs did not mitigate their damages. Defendant had the burden of proving that plaintiffs failed to mitigate their damages. See *Morris v Clawson Tank Co*, 459 Mich 256, 266; 587 NW2d 253 (1998). The testimony indicated that plaintiffs' grinding operation could not continue to operate profitably, and that Fusco therefore sold it in an effort to mitigate plaintiffs' losses. The evidence showed that certain equipment had already been sold in an effort to mitigate damages as well. Defendant did not counter this evidence with any significant proof of a failure to mitigate. Defendant did not meet its burden of proving that plaintiffs failed to mitigate their damages.

C. Speculative Damages

Defendant also contends that the amount of damages awarded was improper because the damages were merely speculative. In *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995), this Court stated:

> A party asserting a claim has the burden of proving its damages with reasonable certainty. *S C Gray, Inc v Ford Motor Co*, 92 Mich App 789, 801; 286 NW2d 34 (1979). Although damages based on speculation or conjecture are not

> recoverable, *Sutter v Biggs*, 377 Mich 80, 86; 139 NW2d 684 (1966), damages are not speculative merely because they cannot be ascertained with mathematical precision. *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965). It is sufficient if a reasonable basis for computation exists, although the result be only approximate. *McCullagh v Goodyear Tire & Rubber Co*, 342 Mich 244, 255; 69 NW2d 731 (1955). Moreover, the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages. *Bonelli v Volkswagen of America, Inc*, 166 Mich App 483, 511; 421 NW2d 213 (1988).

Defendant's calculations, which were used in determining damages, had been derived using actual data regarding the tonnage of available, grindable waste. Regardless of what defendant now contends, the documents provided what defendant believed at the time to be "tonnage that was targeted to be ground by [plaintiff]." Although these figures may have been approximations, they were reasonably calculated by defendant on the basis of actual data. See *Hofmann, supra* at 108, quoting *McCullagh, supra* at 255. Because there was a reasonable basis for calculating the damages in this case, there exists no basis to disturb the jury's award. The trial court did not abuse its discretion in denying defendant's motion for remittitur. *Grace, supra* at 367.

VIII. Cumulative Error

Finally, defendant argues that the trial was infected by cumulative error. We disagree. For cumulative error to mandate reversal, consequential errors must result in substantial prejudice that denied the aggrieved party a fair trial. *Lewis, supra* at 200. "[A]ctual errors must combine to cause substantial prejudice to the aggrieved party so that failing to reverse would deny the party substantial justice." *Id.* at 201. In light of our conclusions above, we find no prejudicial cumulative error in this case.

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Jane E. Markey